PETITION FOR WRIT OF CERTIORARI

105

Supreme Court, U.S.
FILED

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NO._____

In the Supreme Court of the United States

VILLAJE DEL RIO, LTD.

Petitioner,

v.

COLINA DEL RIO, LP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court and Court of Appeals below lacked subject matter jurisdiction to consider an appeal from the bankruptcy court because the matter at issue could have no conceivable effect on the bankruptcy estate.

2. Whether the courts below should have abstained from hearing the case and remanded the case to Texas state court because the outcome of the case could have no effect on the bankruptcy estate.

3. Whether the Fifth Circuit's decision that the appeal is moot because the subject property has been foreclosed upon conflicts with the Ninth Circuit's ruling in *Rosner v. Worcester (In re Worcester)*, 811 F.2d 1224 (9th Cir. 1987).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The following persons and entities have an interest in the outcome of this proceeding:

Petitioner:	George Geis, as purchaser of the claims of Villaje del Rio, Ltd. San Antonio, Texas
Counsel for Petitioner:	Mark C. Taylor Eric J. Taube Hohmann, Taube & Summers, LLP 100 Congress Avenue, 18th Floor Austin, Texas 78701
Respondent:	Colina Del Rio, LP San Antonio, Texas
Related Parties:	Colina Del Rio Management, LLC (general partner of Respondent) San Antonio, Texas David Adelman (limited partner) San Antonio, Texas David Kahn (Manager of LLC) Austin, Texas

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George Geis, as assignee of the claims of Villaje Del Rio, Ltd. ("Petitioner")[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A-1) is reported at 2008 WL 2570730. The opinion of the District Court (App. A-7) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions at issue are found in 28 U.S.C. §1334:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

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[1]As set forth below, George Geis acquired the claims in this case from the Chapter 7 Trustee. Mr. Geis filed a Motion to Substitute parties with the District Court, which was never ruled upon. For simplicity, the term "Petitioner" is used to describe Villaje and Mr. Geis as assignee, but Mr. Geis is the real party in interest.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) other than a decision not to abstain in a proceeding described in subsection (c)(2) is not reviewable by appeal or otherwise by the court of appeals under section 159(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

STATEMENT

Procedural Background

Villaje Del Rio, LP was the debtor-in-possession in a voluntary Chapter 11 proceeding, which was filed on May 1, 2006. George Geis was the President of the Debtor's general partner. Prior to filing for bankruptcy, on April 27, 2006, Petitioner sued Colina Del Rio, LP ("Respondent") and others in Bexar County state district court (the "State Court Action") in seeking, *inter alia*, to restrain Respondent from foreclosing on its Mortgage Note (the "Note") until the value of claims asserted against Deutsche Bank Berkshire Mortgage, Inc. ("DBBM") (which had transferred the Note to Respondent) were determined. App. A-50. After Petitioner filed for Chapter 11 bankruptcy, Respondent removed that action to this Court by filing a Notice of Removal on May 11, 2006. This matter proceeded as an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court.

During the course of Petitioner's bankruptcy proceeding, on July 19, 2006, Respondent obtained a ruling from the Bankruptcy Court terminating the automatic stay, allowing it to proceed with its remedies under state law. On August 1, 2006, Respondent foreclosed its lien on the real property securing payment of the indebtedness. Respondent itself purchased the real property at the foreclosure sale.

On August 7, 2006, Respondent filed its Motion for Summary Judgment in the Adversary Proceeding.

B.R. 19. Following a hearing held on October 23, 2006, the Bankruptcy Court orally granted the Motion for Summary Judgment on November 9, 2006. On November 14, 2006, the Bankruptcy Court entered its Amended Final Judgment, granting Respondent's Motion for Summary Judgment (the "Final Judgment"). Pursuant to the Judgment, the claims relating to Respondent were certified as final and appealable. The Adversary Proceeding continued against DBBM. Petitioner filed its Notice of Appeal on November 14, 2006, appealing the Final Judgment.

During the course of the appeal with the District Court, on January 3, 2007, Respondent filed its Motion Dismiss Appeal as Moot, arguing that the appeal is moot because it has foreclosed on real property securing payment of the promissory note. On June 13, 2007, Petitioner filed its Motion for Abstention and Remand, arguing that the District Court lacked or should not exercise jurisdiction over the appeal because the Debtor's estate no longer had any interest in the outcome of this proceeding. Following a hearing on June 26, 2007, the District Court entered its order granting Respondent's Motion to Dismiss the Appeal as Moot on July 31, 2007. App. A-7. On August 6, 2007, Petitioner filed its Motion for New Trial or Motion for Relief from Judgment (the "Motion for New Trial") seeking a determination that the Court should abstain from hearing the appeal based upon the Motion for Abstention filed by Petitioner. The Court entered an Order denying Petitioner's Motion for New Trial on August 27, 2007. Petitioner filed its Notice of Appeal to the Court of Appeals on September 14, 2007, and filed an Amended Notice of Appeal (to correct an

error in formatting) on September 24, 2007. On June 25, 2008, the Court of Appeals entered its Opinion and Judgment affirming the District Court. App. A-1.

Factual Background

Petitioner executed a non-recourse Deed of Trust Note (the "Note") payable to a predecessor of DBBM in the principal amount of $26,747,700 secured by a deed of trust, to finance a residential construction project known as Villaje Del Rio. The Note was assigned from DBBM to the Department of Housing and Urban Development ("HUD")on June 22, 2005. Respondent purchased the Note from HUD, and HUD assigned the Note to Respondent on December 20, 2005.

In the Petition filed in the State Court Action, Petitioner asserted claims against DBBM for tortious interference and economic duress. App. A-50, 52-55. The Petition further alleged that Respondent purchased the Note with knowledge of the claims and defenses held by Petitioner, thus precluding Respondent from being a holder in due course. App. A-54. Respondent does not contend that it is a holder in due course. Petitioner sought to assert the damages resulting from DBBM's conduct as a setoff or recoupment against the indebtedness under the Note arguing that if successful, no debt would exist upon which Respondent could base a foreclosure under the Deed of Trust. Respondent contended that no right of setoff or recoupment existed under applicable Texas law. The Bankruptcy Court agreed, and granted

Respondent's Motion for Summary Judgment on November 13, 2006.

As set forth above, during the course of the bankruptcy proceeding, Respondent had obtained an order granting them the right to pursue its remedies under the Deed of Trust. On August 1, 2006, Respondent foreclosed its lien at a foreclosure sale conducted in Bexar County, Texas, and purchased the property. Respondent remains the owner of the property.

On February 15, 2007, the bankruptcy court converted Petitioner's bankruptcy proceeding from a case under Chapter 11 to a proceeding under Chapter 7. Helen Schwartz was appointed the Chapter 7 Trustee. On May 2, 2007, pursuant to the Bankruptcy Court's Order, the Trustee sold various assets of the estate, including the claims and causes of action made the basis of this proceeding. App. A-24, 29-30. Mr. Geis acquired the claims of Villaje Del Rio against Respondent Colina Del Rio and DBBM pursuant to the sale. Because the sale of the assets to Mr. Geis individually meant that the outcome of this proceeding (and the proceeding against Deutsche Bank) could not have an effect on the estate, Mr. Geis filed a Motion for Abstention and Remand with the District Court in the appeal below. App. A-43. The District Court did not rule on the motion and, instead, following the oral argument on the appeal, granted Respondent's Motion to Dismiss the Appeal as moot, holding that because Respondent had foreclosed its lien and acquired the property at the foreclosure sale, it could not fashion a remedy for Petitioner. Thereafter, Petitioner filed a

Motion for New Trial, seeking a new trial on the basis that the Court lacked jurisdiction over this proceeding or because the District Court should abstain because of the sale of these claims and causes of action to Mr. Geis, which Petitioner had raised in its Motion for Abstention. The District Court entered its Order on August 27, 2007, denying the Motion for New Trial, though it made no holdings concerning the jurisdictional issues raised in the Motion for Abstention.

ARGUMENT

There is No Federal Subject Matter Jurisdiction

Though raised by Petitioner, the Fifth Circuit did not directly address the issue of subject matter jurisdiction. A court has a continuing duty to examine its subject matter jurisdiction during the course of a proceeding. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct 1563, 1570 (1999); *Bass v. Denney (Matter of Bass)*, 171 F.3d 1016, 1021 (5th Cir. 1999). Where a court lacks subject matter jurisdiction, any orders it enters are void. *Querner v. Querner (Matter of Querner)*, 7 F.3d 1199, 1201 (5th Cir. 1993). Petitioner respectfully submits that the Courts below have committed a manifest error of law in dismissing the appeal as moot and, instead, should have declined to exercise any jurisdiction over this proceeding and remanded this matter to state court.

28 U.S.C. §1334(a) defines and limits a district court's bankruptcy jurisdiction to "...all civil proceedings arising under title 11, or arising in or

related to cases under title 11." The State Court Action was, at one time, a "related to" proceeding, as it was pending as the Adversary Proceeding. As noted above, however, the circumstances changed. Petitioner's Chapter 11 proceeding was converted to a proceeding under Chapter 7 pursuant to the Bankruptcy Court's Order dated February 15, 2007. On May 1, 2007, the Bankruptcy Court held an auction of the remaining assets of Petitioner. At that auction, Mr. Geis purchased the claims asserted by Villaje in this proceeding, and according to the Order approving the sale on May 2, 2007, Mr. Geis is now the owner of these claims. The bankruptcy estate has no continuing interest in this proceeding, and the outcome of this litigation will have no conceivable effect on the bankruptcy estate because the outcome will neither reduce nor enhance the estate.

As stated above, bankruptcy jurisdiction is limited. When a dispute no longer affects the estate or the relationship among creditors, bankruptcy jurisdiction lapses. *Reichman v. United States Fire Ins. Co. (Matter of Kilgus)*, 811 F.2d 1112, 1117 (7th Cir. 1987). Moreover, simply because a court acquired bankruptcy jurisdiction over a dispute does not mean that it will always be able to exercise jurisdiction over the dispute. *Elscint v. First Wisconsin Financial Corp. (Matter of Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987). Where, for example, property leaves the estate, bankruptcy jurisdiction lapses with respect to that property. *Id.*; *In re Marshall's Transit Co.*, 889 F.2d 520, 522 (3d Cir. 1989)(same holding). Because there can be no conceivable effect on the estate, there is no basis for federal subject matter jurisdiction over this

proceeding. *Wood v. Wood (Matter of Wood)*, 825 F.2d 90, 93 (5th Cir. 1987)(in order to invoke bankruptcy jurisdiction, the matter must at least have some conceivable effect on the estate). Accordingly, there is no basis for subject matter jurisdiction over this proceeding.[2]

The District Court Should Have Abstained from Hearing The Appeal and Remanded the Case

Even if subject matter jurisdiction arguably existed, the District Court erred in not abstaining from the appeal. The section 28 U.S.C. §1334(c)(2) provides:

> (c)...(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

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[2]Similarly, Section 1334(e), by its terms, limits the exclusive jurisdiction to property of the estate; the claims at issue are not property of the estate.

Accordingly, courts *must* abstain from hearing a state law claim if the following requirements are met: (1) a motion has been timely filed requesting abstention; (2) the cause of action is essentially one that is premised on state law; (3) the claim is a non-core proceeding, *i.e.*, it is "related to" a case under title 11 but does not arise under or in a case under title 11; (4) the proceeding could not otherwise have been commenced in federal court absent federal jurisdiction under §1334(b); (5) an action has been commenced in state court; and (6) the action could be adjudicated timely in state court. *See Schuster v. Mims (In re Rupp & Bowman Co.)*, 109 F.3d 237, 239 (5th Cir. 1997); *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1206 (5th Cir. 1996).

Under these standards, abstention is mandatory in this case. First, Geis timely filed his motion, less than 45 days from the date of the May 2, 2007 Order approving the auction sale to Mr. Geis. As reflected in the docket sheet, there was little activity in the appeal in that time period.

Second, the causes of action in this proceeding are premised upon Texas state law. Specifically, in this proceeding, Petitioner sued for damages under Texas state law theories for tortious interference and economic duress. These matters are governed by Texas state law and not by any federal law. The issues between Petitioner and Respondent, *i.e.*, whether Petitioner is entitled to set-off or recoupment of its damages against the indebtedness asserted by Respondent are governed exclusively by Texas state

law. Similarly, a wrongful foreclosure claim is a state law cause of action.

Third, this is clearly a non-core proceeding. In the 5th Circuit, the test of whether a claim is core or non-core is quite clear: "a proceeding is core under §157 if it invokes substantive rights provided by Title 11 or if it is a proceeding that, by its nature, could only arise in the context of a bankruptcy case". *Wood v. Wood (Matter of Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). Because Mr. Geis has purchased the claims in this proceeding, and the causes of action are not of the type that could only arise in a bankruptcy proceeding, this matter is non-core.

Fourth, this proceeding could not otherwise have been commenced in federal court absent bankruptcy jurisdiction. When filed in state court, and when removed to this court, there was no diversity of citizenship between the parties, with a Texas party as plaintiff and two of the three defendants as Texas parties. Moreover, *as between the parties to this appeal*, there is clearly no diversity because both Petitioner and Respondent are Texas limited partnerships (or, in Mr. Geis' case, a Texas resident). Additionally, there was (and is) no basis for federal question jurisdiction. Accordingly, this proceeding could not have been commenced in federal court absent the bankruptcy court jurisdiction under §1334(b). In determining whether this element is met (*i.e.*, whether the case could have been commenced in federal court absent bankruptcy jurisdiction), the specific working of the statute requires that the Court look at the posture as of the time of removal. *See J.T. Thorpe Co.*

v. American Motorists, 2003 WL 23323005 at *4 (S.D. Tex. 2003); *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp.2d 596, 606 (S.D. Tex. 1999). *As noted above, as of the time of removal*, there was no diversity.

Finally, this action has clearly already been commenced in state court, and Petitioner believes it can be timely adjudicated in state court. The courts in Bexar County, Texas are well suited to handle a proceeding involving questions of Texas state law, and the parties can obtain appropriate settings with the state courts.

Even if abstention was not mandatory, the District Court should have exercised its discretion to abstain from hearing this matter, and remanded the action to state court. Discretionary abstention under 28 U.S.C. §1334(c)(1) is typically applied by bankruptcy courts by reference to twelve different factors to determine whether discretionary abstention is appropriate. *See, e.g., Republic Reader Service, Inc. v. Magazine Service Bureau, Inc. (In re Republic Reader Service, Inc.)*, 81 B.R. 422 (Bankr. S.D. Tex. 1987). These factors include, among other things, whether the proceeding is core or non-core, what state law is applicable, the effect on the administration of the bankruptcy estate, the possibility of forum shopping, the burden on the bankruptcy court's docket, the right to jury trial and other matters. Clearly, this is a non-core proceeding, which has no effect on the bankruptcy estate (as noted, the Estate no longer holds any interest in the claims asserted). The issues and claims are claims under Texas state law.

Moreover, there is no likelihood that this is an exercise in forum shopping by the Petitioner, as this action was originally commenced in state court, which can timely adjudicate these matters and can clearly hold a jury trial as requested by the Petitioner. Finally, there is no danger or prejudice to Respondent, which was originally sued in Bexar County state court to begin with. As such, discretionary abstention is appropriate.

In its opinion (App. A-6), the Fifth Circuit held that abstention does not apply to a district court's exercise of appellate jurisdiction over a bankruptcy court's rulings, citing *Edge Petroleum Operating Co., Inc. v. GPR Holdings, LLC*, 483 F.3d 292, 301 (5th Cir. 2007). In *Edge*, the Fifth Circuit only held that a district court's decision not to exercise discretionary abstention (as opposed to mandatory abstention) is not reviewable. *Id.*

The Fifth Circuit's analysis is misplaced. First, by the very terms of Section 1334(d), the limitation on appeals applies to decisions declining to exercise discretionary abstention – ignoring the fact that abstention was mandatory in this case. Second, the District Court never even ruled on the Motion for Abstention.

In short, there is no basis for this Court to continue to exercise jurisdiction over this proceeding, nor for the federal district court to do so. As such, abstention is appropriate.

The Fifth Circuit's Decision Conflicts With The Holdings Of The Ninth Circuit

Assuming this Court finds that the exercise of jurisdiction was appropriate, granting the Petition is still appropriate to resolve a conflict between the Circuits. The Fifth Circuit held that Petitioner's appeal was moot because the property that was the subject of the State Court Action had been foreclosed upon, and no relief could be fashioned. App. A-4-5. The United States Court of Appeals for the Ninth Circuit has held directly to the contrary. *Rosner v. Worcester (In re Worcester),* 811 F.2d 1224, 1228 (9th Cir. 1987). In *Rosner*, the Ninth Circuit held that an appeal following foreclosure is not moot if applicable state law would permit the foreclosure to be set aside. *Id.* The Court found that applicable California law permitted a party to sue to set aside a foreclosure sale, and overturned the district court's holding that the appeal was moot. As Petitioner argued below (and as the Fifth Circuit recognized in its opinion), under Texas law, a party may recover monetary damages *or recover the property* in an action for wrongful foreclosure. *Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986); *University Savings Association v. Springwood Shopping Center*, 644 S.W.2d 705, 706 (Tex. 1982). Accordingly, because applicable state law provides a remedy to recover property, the appeal is not moot.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[FILED ON JUNE 25, 2008]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-51158
Summary Calendar

In the Matter Of: VILLAJE DEL RIO, LTD.
Debtors

- -

VILLAJE DEL RIO, LTD.; GEORGE GEIS
Appellants

v.

COLINA DEL RIO, LP
Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:06-CV-1102-WWJ

Before JONES, Chief Judge, and CLEMENT, and SOUTHWICK, Circuit Judges. EDITH H. JONES:*

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The background of this case is convoluted but its disposition is clear. The district court correctly dismissed the appeal from the bankruptcy court as moot.

BACKGROUND

Appellant Villaje del Rio ("Villaje") defaulted on a non-recourse note exceeding $26 million that it used to finance the construction of a multifamily apartment complex in San Antonio, Texas. Following the default, Colina del Rio ("Colina") purchased the note. Colina noticed a foreclosure sale, and Villaje sued Colina and Deutsche Bank, the original lender, in state court seeking a TRO to prohibit Colina from holding the sale.[1] Villaje also claimed a right of setoff against the mortgage note and a right of recoupment against Colina for damages Villaje suffered at the hands of Deutsche Bank.

After Villaje refused to post the bond upon which the TRO was conditioned (thus forfeiting the TRO), it filed for chapter 11 bankruptcy relief. Colina then removed the state court lawsuit to the bankruptcy court, which initiated an adversary proceeding.

Colina moved the bankruptcy court for an order allowing it to exercise its state-law right of foreclosure. The bankruptcy court concluded that Villaje was not entitled to setoff or recoupment and that Colina's

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[1]Villaje alleged Deutsche Bank tortiously interfered with Villaje's contract with the general contractor.

request for a relief from the automatic bankruptcy stay was appropriate. Villaje's counsel then requested a stay pending appeal, which the bankruptcy judge stated he was inclined to give. But Villaje never formally requested a stay, and it did not appeal the relief order. Instead, it filed a motion for reconsideration that the bankruptcy court denied. Colina foreclosed on August 1, 2006, and purchased the property at auction.

In November 2006, Colina obtained summary judgment on Villaje's state-law recoupment and setoff claims. The bankruptcy court concluded Villaje was not entitled under Texas law to either setoff or recoup any damages Villaje may possibly be awarded against Deutsche Bank in the adversary proceeding against what it owed to Colina under the note.

The adversary proceeding continued against Deutsche Bank, while the judgment for Colina was certified for appeal. Villaje appealed to the district court, which granted Colina's motion to dismiss as moot because the property had already been sold in the foreclosure sale. Villaje then filed a motion for new trial under FRCP 59 and 60, which was denied. Villaje now appeals.

DISCUSSION

Villaje makes two main arguments. First, it claims that the district court erred in applying the equitable mootness doctrine because a remedy could be fashioned if its legal claims proceeded against Colina.

Villaje's mootness argument lacks merit. A district court case almost directly on point explains the application of the mootness doctrine in this situation. *See First Mortgage Atrium Bldg. v. Mut. Life Ins. of N.Y.*, 92 B.R. 202, 206-07 (E.D. Tex. 1988). Further, this court's consideration of a very similar scenario in *Sullivan Cent. Plaza I, Ltd. v. BancBoston Real Estate Capital Corp.*, 914 F.2d 731, 734 (5th Cir. 1990), *reh'g* 935 F.2d 723 (5th Cir. 1991), also disposes of the case. The factual distinctions are without a difference in this case. Both of those cases hold that equitable mootness exists and an appeal must be dismissed when a party attacking a bankruptcy order approving foreclosure fails to obtain a stay of the foreclosure pending appeal. Were it otherwise, the appellate courts would be able to reverse duly authorized foreclosures and create havoc in bankruptcy administration. *Sullivan Cent.*, 914 F.2d at 734; *see also* 11 U.S.C. § 363(m). The courts apply mootness because we are unable to grant effective relief on appeal. Importantly, Villaje's goal, acknowledged in its brief, is to preserve its ability to recover the property by settling Colina's note through damages it hopes to recover from Deutsche Bank. This is precisely the type of claim foreclosed by equitable mootness.

Villaje nevertheless asserts that a cause of action for wrongful foreclosure allows the possibility of such recovery. Villaje contends that neither the bankruptcy nor the district court addressed whether a wrongful foreclosure action *based on claims unrelated to the termination of the automatic stay* could be maintained by a debtor notwithstanding the foreclosure. Theoretically, this is correct. *See Amer.*

Grain Ass'n v. Lee-Vac, Ltd., 630 F.2d 245, 248 (5th Cir. 1980); *Matter of First Mortgage Atrium Bldg.*, 92 B.R. at 207 (court could refuse to rescind a foreclosure where no stay had been obtained but could also require bankruptcy court to make findings as to exact amount of mortgage debt owed).

The record before us does not support Villaje's contention, however. Villaje has not been deprived of its potential monetary recovery. Villaje's severed litigation against Deutsche Bank continued after its appeal of the judgment for Colina.[2] No claim Villaje may have against Colina has been foreclosed, but Villaje has never filed such a claim. No such claim was pending before the bankruptcy or district courts. The only claim alleged in the pleadings sought to prevent, by means of recoupment or setoff, Colina's foreclosure before it occurred. The fact that Villaje may maintain a residual but as-yet unlitigated and unarticulated money damage claim against Colina does not transform the present suit or appeal into an exception to the mootness doctrine.[3] Thus, the district court correctly concluded the appeal was moot.

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[2]Villaje informs us that the bankruptcy court elected to remand this litigation back to state court following the foreclosure sale, noted in the next section, of Villaje's assets.

[3]We acknowledge Colina's admission in its brief that, "If Colina has liability independent of the claims against Deutsche Bank, the assertion of setoff and/or recoupment ... is not necessary for a money damages claim directly against Colina [pursuant to Texas law]." Appellee's Br. 18-19.

In the alternative, Villaje argues that the district court should have abstained and remanded to state court because while its appeal was pending in the district court, Villaje's chapter 11 proceeding was converted to a chapter 7 in February 2007, Geis purchased Villaje's assets, including its legal claims, at an auction in May 2007, and thus the Villaje bankruptcy estate has no continuing interest in the case.[4] The district court was not required to abstain from issuing a mootness ruling, because abstention, provided for in 28 U.S.C. § 1334(c), does not apply to the court's exercise of appellate jurisdiction over bankruptcy court orders pursuant to 28 U.S.C. §158(a). *Edge Petroleum Operating Co. Inc. v. GPR Holdings, LLC*, 483 F.3d 292, 301 (5th Cir. 2007). It also follows from the grant of statutory appellate jurisdiction to the district court that it had the power to adjudicate the appeal without restrictions arising from the conferral of original bankruptcy jurisdiction under 28 U.S.C. §1334(a) and (b). There was no jurisdictional impairment to the district court's disposition of the appeal as moot.

CONCLUSION

We AFFIRM the district court's dismissal of the appeal from the bankruptcy court.

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[4]The district court never ruled on Geis's motion to substitute himself as a party, dismissing it as moot. This order is not challenged on appeal.

[FILED JULY 31, 2007]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VILLAJE DEL RIO, LTD.	§	
Appellant,	§	Civil Action No.
	§	SA-06-CA-1102-WWJ
V.	§	
	§	
COLINA DEL RIO, L.P.,	§	
Appellee.	§	

Appeal from the United States Bankruptcy Court
For the Western District of Texas, San Antonio
Division

IN RE:	§	
	§	Bankruptcy Case
VILLAJE DEL RIO, LTD.	§	No.: 06-50797-RBK
Debtor.	§	

MEMORANDUM OPINION

This civil action is before the Court on appeal from the United States Bankruptcy Court for the Western District of Texas. The parties presented oral argument on the merits of the appeal and the Appellee's motion to dismiss the appeal, as moot. For the reasons stated below, the appeal will be dismissed, as moot.

BACKGROUND

Villaje Del Rio ("Villaje"), the Appellant and debtor, is a Texas limited partnership. Villaje undertook the development and construction of a multi-family residential apartment complex ("the project"), in downtown San Antonio. The project was financed by a $26,747,700.00 non-recourse note, and was secured by a deed of trust. Villaje defaulted on the note. The holder of the note, the United States Department of Housing and Urban Development, sold the note and deed of trust to the highest bidder: the Appelle, Colina Del Rio ("Colina"). Some time later, Colina provided Villaje with additional notice of a default, and requested payment of the accelerated balance. When Villaje did not pay, Colina posted a notice of foreclosure sale.

Villaje immediately sued Colina in the District Court of Bexar County, 57th Judicial District of Texas. Villaje alleged that Deutsche Bank Berkshire Mortgage, Inc. ("Deutsche Bank"), a predecessor in interest to Colina, tortiously interfered with the construction contract between Villaje and the general contractor, Andres Holding Corporation. Villaje claimed that the damages caused by such tortious interference exceeded the balance due under the note, and ultimately caused Villaje's default. Villaje sought a temporary restraining order to prevent Colina from foreclosing on the property. The District Court of Bexar County, 57th Judicial District of Texas, issued a temporary restraining order, conditioned upon the posting of a $70,000.00 bond.

Villaje chose not to pay the bond. Instead, Villaje filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Colina then removed the state court lawsuit to federal court, thereby initiating the adversary proceeding styled *Villaje Del Rio, Ltd. v. Colina Del Rio, LP, et al.*, Adversary Proceeding No. 06-05090-RBK, in the United States Bankruptcy Court for the Western District of Texas. In the adversary proceeding, Villaje sought to offset or recoup alleged damages arising from its tort claims against Deutsche Bank, as against Villaje's obligations under the note.

As the litigation in the adversary proceeding progressed, Colina filed a motion for relief from the automatic stay, in order to foreclose on the property. The bankruptcy court held a hearing on the motion, and determined that it was proper to lift the automatic stay. Accordingly, the bankruptcy court granted Colina's motion, thereby paving the way for it to foreclose on the property.

Faced with the looming prospect of foreclosure, Villaje asked the bankruptcy court if it would entertain a motion to stay its decision to lift the automatic stay, so that it could take the issue up on appeal at the district court. The bankruptcy court assured Villaje's attorney, Mr. Taube, that it would certify the issue for appeal, pursuant to Federal Rule of Bankruptcy 8005. Relevant portions of the bankruptcy court's lengthy colloquy on this matter follow:

MR. TAUBE: Your honor, just a couple of things. First of all, will the Court entertain a stay pending appeal?

THE COURT: I will entertain a stay pending appeal. We'll have to talk about what its terms would be. And I would set that for a separate hearing, sooner rather than later. Obviously, a foreclosure sale can't take place instantaneously, but I will hear that sooner rather than later. And I'll be more than happy to consider a stay pending appeal.[5]

* * * * *

MR. TAUBE: I'd ask the Court if the Court will permit us to take an appeal of the [...] ruling [lifting the automatic stay], since it is not a final ruling?

THE COURT: I will – I will be happy to certify this matter for immediate appeal. So far as I'm concerned, the issue is of sufficient importance, ultimate importance, to the disposition of

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[5]Tr. of Hrg. on July 19, 2006, before the Honorable Leif M. Clark, United States Bankruptcy Judge, at 32.

this case that I think it should be subject to immediate appellate review. To the extent that any higher court's interested in my opinion, that's my opinion.

MS. WILLIAMSON: And, your Honor, may we assume that any stay would be subject to a pleading and an opportunity to respond?[6]

THE COURT: I would expect to have a response from you. And I would expect to have a very prompt hearing so that the benefits of a stay wouldn't become moot by the passage of time.

MR. TAUBE: And that is my purpose, obviously, in asking, your Honor. If the Court is disinclined to grant a stay, I need to go to the district court immediately.

THE COURT: Counsel, I am not disinclined to grant a stay. I am – In fact, I think the district court would prefer that I give due consideration to what the parties have to say. I am not

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[6]Ms. Williamson represents Colina.

disinclined to grant a stay, so I'd very much appreciate your filing a pleading.

MR. TAUBE: I'll do so, your Honor, as soon as humanly possible.

THE COURT: Okay.

MS. WILLIAMSON: And, your Honor, depending on the conditions of the stay, I mean, if it involves a bond, we may agree. Who knows? I mean, I think the pleading would be the appropriate method.

THE COURT: All right. Very good, then. Let me do this for you, Mr. Taube, just in an abundance of caution. If you will get a motion on file by no later than close of business tomorrow with respect to a stay, I will grant, today, a limited stay until the close of business tomorrow so that no further action can be taken with respect to the matter until then. I wouldn't expect that there would be any, but just in case you're concerned about that, I'll give you that.

MS. WILLIAMSON: And, your Honor, I will represent to the Court there's nothing we intend to do between now and Friday. I mean, we've posted for foreclosure.

THE COURT: Well, between my statements and your representations, I think Mr. Taube is safe.

MR. TAUBE: Your Honor, I appreciate that. Just so the court knows, whether it's possible to get that on file between now and tomorrow is subject to some debate.

THE COURT: You want –

MR. TAUBE: Obviously, the order is –

THE COURT: If you want until Friday – Remember, I'm only talking about the motion for stay. I understand that a motion for reconsideration may take a little bit more work. But the motion for stay, well, that's pretty straightforward.

MR. TAUBE: It is such - I guess what I'm focusing on, more than anything else, your Honor, is it is part of that motion that I'm going to

have to demonstrate to the Court that you can be wrong.

THE COURT: Right.

MR. TAUBE: Which effectively is the same as the motion for reconsideration. It is going to require, at least to some degree, I believe, the ability to get the trial transcript so that I can – other than the use of this –

THE COURT: I don't think so, Mr. Taube, and let me tell you why. Your truly wrote a decision called *In re: Gleasman*. And one of the things that I ruled in that case – It's very old now, but I still remember it.

MR. TAUBE: I'm very familiar with that case, your Honor.

THE COURT: One of the things that I ruled in that case is that I certainly don't legitimately expect a party to convince a court in order to get a stay that I ruled one way, but, of course, I'm wrong, so I'll grant you a stay. No court's going to do that. I mean, the relief standards of likelihood of success on the merits really

don't play out quite as accurately and as well when one looks at appeals of 362 and 363 orders. And I know that. So, the approach that I take is, if we've got a matter that is an appropriate subject for appellate review, because reasonable minds could differ on the application of the law, that's sufficient for me. Okay?

MS. WILLIAMSON: But is the Court ruling on what the conditions of a stay would be?

THE COURT: Absolutely not.

MS. WILLIAMSON: Thank you.

THE COURT: That's an entirely different question. All I'm saying is, I'm addressing the concern that Mr. Taube has raised that somehow or another he's going to need a whole bunch of time for his motion for stay pending appeal because it will really be, in effect, a motion for reconsideration. I respectfully disagree. I don't think so.

MS. WILLIAMSON: And, your Honor, of course, what the district court would

require would be entirely different.

THE COURT: Well, I can appreciate that, as well. There may be some advantages to being before this Court.

All right. Maybe you can't get it done by tomorrow, but I think you can get a motion for stay pending appeal before the Court without the necessity of a transcript....

MR. TAUBE: I'll do my best, your Honor.[7]

The critical development in this case occurred when Villaje chose not to file a motion for stay pending appeal. Despite the fact that the bankruptcy court assured Villaje that it would grant such a stay, Villaje never sought appellate review at that time.

Instead, Villaje opted to pursue another strategy. It filed a motion for reconsideration of the bankruptcy court's order granting Colina's motion for relief from the automatic stay. The bankruptcy court denied Villaje's motion to reconsider. Shortly thereafter, Colina conducted a foreclosure sale on the property. Colina was the successful bidder at the duly noticed sale.

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[7] *Id.* at 38-43.

After the foreclosure, Colina filed a motion for summary judgment in the adversary proceeding, on the issues of setoff and recoupment. Colina argued that under Texas law, Villaje had no entitlement to the remedies of setoff or recoupment for any alleged damages that it might have been awarded in the adversary proceeding, against any amounts owed to Colina under the note. The bankruptcy court agreed, and granted Colina's motion for summary judgment on those grounds. The bankruptcy court then issued an Amended Final Judgment in Colina's favor. As noted previously, the case is now before this Court on appeal from the bankruptcy court's order granting summary judgment in Colina's favor.

JURISDICTION

A district court has jurisdiction to decide an appeal from the final order of the bankruptcy court within its judicial district. *See* 28 U.S.C. § 158(a). Accordingly, this Court has jurisdiction to consider the instant appeal from the United States Bankruptcy Court for the Western District of Texas, San Antonio Division.

STANDARD OF REVIEW

The district court reviews the factual findings of the bankruptcy court for clear error. *See See* FED. R. BANKR P. 8013; *In re: Nat'l Gypsum Co.*, 208 F.3d 498, 504 (5th Cir. 2000), *cert. denied*, 531 U.S. 871 (2000). The district court reviews the bankruptcy court's conclusions of law *de novo*. *See id.* Mixed questions of law and fact are reviewed *de novo*. *See id.*

ANALYSIS

Before turning to the merits of the appeal, the Court must first address Colina's contention that the appeal should be dismissed, on mootness grounds. Even if the bankruptcy court wrongly granted its motion for summary judgment, Colina argues, this Court is powerless to grant an appropriate remedy to Villaje. Villaje concedes that the purpose of this appeal is to retain an alleged right to avoid Colina's foreclosure on the property by preserving its alleged ability to setoff or recoup any damages it might be awarded in the adversary proceeding. But because Colina has already foreclosed on the property, and because Texas law does not provide a right of redemption, Colina argues that the foreclosure is a *fait accompli*. As such, Colina contends, the ultimate relief sought by Villaje – a right to avoid the foreclosure – cannot be obtained, and renders the appeal moot. Villaje, on the other hand, alleges that its appeal is not moot because it may be entitled to recover money damages or the property in a wrongful foreclosure action.

Courts will ordinarily dismiss a bankruptcy appeal under the "equitable mootness doctrine" if "an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary ...." *First Mortgage Atrium Bldg., Ltd. v. Mutual Life Ins. Co. of New York*, 92 B.R. 202, 203 (E.D. Tex. 1988) (citing *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985)); *Fink v. Continental Foundry & Mach. Co.*, 240 F.2d 369, 374 (7th Cir. 1957) *cert. denied*, 354 U.S. 938 (1957); *Sobel*

v. Whittier Corp., 195 F.2d 361, 363 (6th Cir. 1952). As the Court in *First Mortgage* explained, the equitable mootness doctrine is a tool to ensure the finality of judgment, and to protect bona fide purchasers. *See id.* The doctrine renders an appeal moot when a debtor fails to obtain a stay pending appeal from the bankruptcy court, the creditor then forecloses on assets in which it has an interest, and the appellate court is powerless to provide adequate relief to the debtor, since the collateral has already been sold. *See id.* (citing *Country Fairways, Inc. v Mottaz*, 539 F.2d 637, 641 (7th Cir. 1976); *In re Abingdon Realty Corp.*, 530 F.2d 588, 590 (4th Cir. 1976)).

In *First Mortgage*, the Honorable Richard A. Schell, United States District Judge for the Eastern District of Texas, surveyed the history and application of the equitable mootness doctrine. *See* 92 B.R. at 203-05 (noting that the Eleventh Circuit provides no exceptions to the mootness doctrine, whereas the Ninth Circuit allows an exception when real property is sold to a creditor who is a party to the appeal and statutory rights of redemption exist under state law). The court in *First Mortgage* explained:

> [T]his court believes the Fifth Circuit would frame the mootness rule as follows: If a debtor fails to obtain a Stay Pending Appeal and foreclosure occurs, an appellate court will not grant relief having the effect of reversing the foreclosure, unless the creditor who

> purchased real property at foreclosure is a party to the appeal and statutory rights of redemption exist under applicable state law.

Id. at 207. As Colina points out, the Fifth Circuit has not articulated a precise definition of the doctrine in this exact context. Nevertheless, in the absence of Fifth Circuit precedent to the contrary, this Court will adopt *First Mortgage's* characterization of the doctrine, as it applies to the facts at bar. *See also Sullivan Cent. Plaza I Ltd. v. BancBoston Real Estate Capital Corp.*, 106 B.R. 931 (N.D. Tex. 1989) (explaining that "This Court concurs with Judge Schell's opinion as to how the Fifth Circuit would frame the issue ...."); *Sullivan Cent. Plaza I Ltd. v. BancBoston Real Estate Capital Corp.*, 914 F.2d 731, 733 ("Obtaining a stay pending appeal guarantees that the district court will be able to grant adequate relief (*i.e.*: enjoin the foreclosure). If the debtor fails to obtain a stay, and if the property is sold in the interim, the district court will ordinarily be unable to grant any relief. Accordingly, the appeal will be moot.").

The Court in *First Mortgage* considered the applicability of the doctrine under factual circumstances that closely parallel those in the instant case. *See* 92 B.R. at 202. In *First Mortgage*, the bankruptcy court lifted the automatic stay, in order to allow the creditor to foreclose on the debtor's property. *See id.* at 202-03. The bankruptcy court then denied the debtor's motion to reconsider, and the foreclosure sale went forward. *See id.* at 203. Just as in the

instant case, the debtor in *First Mortgage* never requested a stay pending appeal, under Bankruptcy Rule of Procedure 8005.[8] *See id.* When the debtor later appealed the bankruptcy court's order lifting the automatic stay well after the foreclosure sale – the district court dismissed the appeal under the equitable mootness doctrine. *See id.* It held that the appeal was moot because: "Texas has no statutory right of

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[8]The Rule states:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court ....

FED. R. BANKR. P. 8005.

redemption. Texas has an equity of redemption, but it perishes when foreclosure occurs pursuant to a valid Deed of Trust." *Id.* at 207. (citing *Rogers v. Fielder*, 392 S.W.2d 797, 798-99 (Tex.Civ.App.–Fort Worth 1965, writ *ref'd n.r.e.*)). As in *First Mortgage*, the appeal in this case should be dismissed as moot, unless the Court has some power to remedy the allegedly erroneous summary judgment ruling.

Villaje cites *Sullivan Central Plaza I, Ltd. v. BancBoston Real Estate Capital Corp.*, 914 F.2d 731, 733-34 (5th Cir. 1990), for the proposition that an appeal is not moot when a party seeks to recover money damages. But Villaje fails to note a critical fact. Villaje has never sought money damages from Colina. It has only sought money damages from Deutsche Bank, the prior holder of the note. On these facts, *Sullivan Central Plaza I* provides no basis for this Court to grant the relief Villaje seeks.

Villaje also argues that, if successful in its appeal, it will have a right to recover the property on a wrongful foreclosure theory. Accordingly, Villaje argues, its appeal is not moot. This claim also fails. First, section 549 of the Bankruptcy Code states the exclusive means for avoiding post-petition transfers of estate property. *See* 11 U.S.C. § 549(a). Under that statute, recovery of such property is permitted only when the transfer is not authorized by the bankruptcy court or a court. *See id.* The bankruptcy court effectively authorized foreclosure here, when it lifted the automatic stay. Thus, the foreclosure was authorized by the bankruptcy court, and cannot be reversed. *See Sullivan Central Plaza I, Ltd.*, 935 F.2d

at 726. Second, Villaje has never even alleged that the foreclosure sale was wrongful. Thus, the two non-bankruptcy cases that it cites, *Farrell v. Hunt*, 714 S.W.2d 298 (Tex. 1986) and *University Savings Association v. Springwood Shopping Center*, 644 S.W.2d 705 (Tex. 1982), are inapposite.

In this case, the Court cannot grant the relief Villaje seeks. Villaje never filed a motion for stay pending appeal, and Colina foreclosed on the property. Even if the bankruptcy court erred in granting summary judgment to Colina on the issues of setoff and recoupment, the procedural posture of and factual developments in this case preclude the Court from granting the relief Villaje requests. Accordingly, under the "equitable mootness doctrine," the Court need not reach the merits of Villaje's appeal.

CONCLUSION

For the reasons stated herein, the appeal should be **DISMISSED, AS MOOT**. Final Judgment will issue by separate Order.

SIGNED this 31st day of July, 2007.

/s/ Wm. Wayne Justice
William Wayne Justice
Senior United States District Judge

[COURT SEAL]

The relief described hereinbelow is SO ORDERED.

Signed May 02, 2007.

/s/ Ronald B. King
Ronald B. King
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re:	§	
	§	Chapter 7 Case
VILLAJE DEL RIO, LTD.	§	
	§	Case No. 06-50797-rbk
Debtor.	§	

ORDER ON CHAPTER 7 TRUSTEE'S MOTION
TO SELL PROPERTY FREE AND CLEAR OF
ALL LIENS AND INTERESTS
(CLAIMS AGAINST COLINA DEL RIO, L.P.)

Came on to be considered the *Chapter 7 Trustee's Motion to Sell Property Free and Clear of All Liens and Interests (Claims Against Colina Del Rio, L.P. and Andres Construction Services, Inc.)* (Docket No. 316) (the "Sale Motion") filed by Helen G. Schwartz, chapter 7 trustee (the "Trustee") in the above styled bankruptcy case. The Sale Motion was modified by the *Agreed Order on Motion for Expedited*

Hearing on Chapter 7 Trustee's Motion to Sell Property Free and Clear of All Liens and Interests (Claims against Colina Del Rio, L.P. and Andres Construction Services, Inc.) (Docket No. 351) (the "Bid Procedures Order"), wherein this Court established certain bidding procedures (the "Bid Procedures") regarding the sale of the assets of Villaje Del Rio, Ltd. (The "Debtor").

The bidding parties were: (1) Colina Del Rio, L.P. ("Colina"), CFA Finance, LLC (CFA), Colina Del Rio Management, LLC (Colina Management") (collectively, Colina, CFA, and Colina Management shall be referred to hereafter as the "Colina Entities"), (2) Deutsche Bank Berkshire Mortgage, Inc. d/b/a DB Berkshire Mortgage, Inc. ("Deutsche"), (3) Andres Holding Corporation f/k/a Andres Construction Services, Inc. ("Andres") and (4) George Geis ("Geis"). Helen G. Schwartz appeared as the Chapter 7 Trustee. Randall A. Pulman appeared on behalf of the Chapter 7 Trustee. Deborah Williamson appeared on behalf of the Colina Entities. Bonnie Hochman appeared on behalf of Deutsche. John Slates appeared on behalf of Andres. Scott Rose appeared on behalf of Geis. Mark Taylor appeared on behalf of the Debtor. At the hearing on the Sale Motion, the Court conducted an auction to determine the highest and best offer, after considering the initial determination made by the Trustee of the lead bid on various assets. The Court, having determined that notice is proper and having considered each of the bids made by the parties attending the hearing, determines that cause exists for granting the relief herein, such that it is hereby

FOUND AND DETERMINED THAT:

A. The Bid Procedures that were approved and adopted by this Court in the Bid Procedures Order were agreed to by the Trustee, the Colina Entities, Andres, and Geis;

B. At the hearing conducted on April 9, 2007, counsel for the Trustee, counsel for the Colina Entities, counsel for Andres, and counsel for Geis appeared on behalf of their respective clients and stated on the record that their clients agreed to be bound by the Bid Procedures with the numbered Asset List, attached hereto as Exhibit 1;

C. Following entry of the Bid Procedures Order, no appeal was taken and the Bid Procedures Order is now final and non-appealable;

D. Colina Del Rio, L.P. was authorized to credit bid up to $15,561,109.35 based upon its validly perfected security interest in the following assets of the Debtor:

I. All claims of the Debtor against Andres Holding Corporation f/k/a Andres Construction Services, Inc. not sounding in tort (Asset 3);

ii. All claims of the Debtor against The Hartford Insurance Company (Asset 4);

iii. All claims of the Debtor against George Geis, George Geis d/b/a Rio City, Villaje Management LLC, Goldbrick, Inc., Rio Architects and Geis Construction not sounding in tort, save and except for claims that may exist or arise under chapter 5 of Title 11, United States Code (Asset 6); and

iv. All personal property that was acquired by or on behalf of the Debtor in connection with the Project (Asset 7);

E. The Colina Entities, Andres, Deutsche and Geis submitted Qualified Bids to the Trustee, either for individual assets or assets in the aggregate, as agreed by the parties;

F. Before the commencement of the bidding, the Court approved the Trustee's valuation of the non-cash consideration of the offers as follows: (1) subordination of Geis claim in the amount of $1.5 million to be valued at $15,000.00; (2) subordination of Andres' claim which had previously been estimated during the pendency of the Chapter 11, at $2 million

at $140,000.00, (3) subordination of Deutsche claim in the amount of $1,554,782.00 at $16,000.00; and (4) the post-petition costs of the Colina Entities in the amount of $10,830.85 to be valued at $1,000.00; Geis objected to the Trustee's valuation of the voluntary subordination of his claim, but was overruled by the Court.

G. The Court also approved credit for Geis' $50,000.00 post-petition administrative payment to Hohmann, Taube & Summers, L.L.P, Debtor's counsel at $50,000.00, which represented the payment made post-petition to Hohmann, Taube & Summers, L.L.P, Debtor's counsel at $50,000.00; however, this credit bid was subject to the right of any party-in-interest to challenge the allowance of such payment as a chapter 11 administrative expense claim against the Debtor's estate;

H. In the interest of judicial economy, it is appropriate that the ten (10) day stay under Rule 6004(h) of the Federal Rules of Bankruptcy Procedure be waived. Each of the Colina Entities, Andres and Geis acted in good faith and are good faith purchasers within the meaning of 11 U.S.C. §363(m).

I. The relief requested in the Sale Motion is in the best interests of the Debtor, its estate and creditors; and it is therefore

ORDERED, ADJUDGED AND DECREE THAT:

1, The Trustee is authorized to sell the assets as itemized on Exhibit 1 attached hereto, "as is, where is."

2. Pursuant to Sections 363(c) and (f) of the Bankruptcy Code, this sale is made free and clear of any and all liens, claims, or encumbrances of any kind, valid and invalid, and that upon sale of the assets and the Trustee being paid the sale price(s), all liens are deemed released as to the assets, as herein set forth, and only those liens of claimants whose lien claims are allowed shall attach to the net proceeds of the sale and shall, under no circumstances, ever revert to the assets themselves.

3. The provisions of §363(m) are applicable to this Order.

4. The aggregate bid of Geis in the amount of $255,000.00, consisting of $240,000.00 in cash and the subordination of Geis' $1.5 million claim valued at $15,000.00 for a total of $255,000.00 is the highest and best offer for the purchase of the

bankruptcy estate's interest in all of the claims held by the bankruptcy estate against Colina Del Rio, L.P. (Asset 1) and all claims against George Geis, George Geis d/b/a Rio City, Villaje Management LLC, Goldbrick, Inc., Rio Architects and Geis Construction sounding in tort (Asset 5), and the sale of such claims to Geis is hereby APPROVED.

5. Upon the closing of the sale of Asset 1 to Geis, the claim of Geis and his related entities totaling $1.5 million is hereby subordinated below that of general unsecured creditors.

6. The aggregate bid of Andres in the amount of $300,000.00 consisting of $160,000.00 in cash and the subordination of its total claim which the Trustee valued at $140,000.00 for a total of $300,000.00 is the highest and best offer for the purchase of the bankruptcy estate's interest in all claims against Andres Holding Corporation f/k/a Andres Construction Services, Inc. sounding in tort (Asset 2), all claims against Andres not sounding in tort (Asset 3), and all claims against The Hartford (Asset 4), and the sale of such claims to Andres is hereby APPROVED.

7. Upon the closing of the sale of Assets 2, 3 and 4, the claim of Andres is hereby

subordinated below that of general unsecured creditors.

8. Within 10 days following verification from Sterling Bank, where the Trustee has her fiduciary account for the Debtor, that Andres' check has cleared or the wire transfer has been consummated, the Trustee is authorized and directed to deliver to Colina the sum of $55,000 from the proceeds of the sale of the Debtor's interest in all claims asserted against Andres Holding Corporation f/k/a Andres Construction Services, Inc. not sounding in tort and the Debtor's interest in all claims asserted against The Hartford Insurance Company, based upon Colina's validly perfected security interest in such claims and causes of action.

9. The credit bid of Colina in the amount of $100,000.00 is the highest and best offer for the purchase of the Debtor's interest in all claims against George Geis, George Geis d/b/a Rio City, Villaje Management LLC, Goldbrick, Inc., Rio Architects and Geis Construction not sounding in tort, save and except for claims arising under Chapter 5 of Title 11, United States Code (Asset 6), and the sale of such claims to Colina is hereby APPROVED.

10. The credit bid of Colina in the amount of $100,000.00 is the highest and best offer

for the purchase of the Debtor's interest in all of the personal property of the Debtor which was acquired by or on behalf of the Debtor in connection of the Project (Asset 7), and the sale of such personal property to Colina is hereby APPROVED.

11. The bid of Geis in the amount of $455,000.00, consisting of $405,000.00 in cash and credit for Geis' $50,000.00 post-petition administrative payment to Hohmann, Taube & Summers, L.L.P, Debtor's counsel, in the amount of $50,000.00 for a total of $455,000.00 is the highest and best offer for the purchase of the bankruptcy estate's interest in all of the claims held by the bankruptcy estate against Deutsche Bank Berkshire Mortgage Inc. (Asset 8), and the sale of such claims to Geis is hereby APPROVED.

12. Upon the closing of the sale of Asset 8 to Geis, the Chapter 11 administrative fees and expenses of Hohmann, Taube & Summers, L.L.P credited by the $50,000.00 retainer previously paid by George Geis and drawn by Hohmann, Taube & Summers, LLP, and no party shall be allowed to claim an administrative expense or subrogated claim on account of such $50,000.00; provided, however, that nothing herein

shall act to reduce the amounts awarded or to be awarded to Hohmann, Taube & Summers, LLP for its fees an expenses as counsel to the Chapter 11 Debtor.

13.. The parties are further authorized and directed to take all actions necessary to effectuate and close the sale of the Assets to Geis and Andres as approved by this Order.

14. The ten (10) day stay provided by Rule 6004(h) of the Federal Rules of Bankruptcy Procedure shall not be applicable and this Order will be effective upon entry.

15. Geis and Andres shall remit to the Chapter 7 Trustee either by certified funds or wire transfers the amounts of their bids minus the deposit of each bidder in the amount of $50,000.00 already on hand with the Trustee no later than Thursday, May 3, 2007 at 5:00 p.m.

16. Pursuant to Bid Procedures, paragraphs 3 and 9, attached hereto as Exhibit 1, should Geis not fund as set forth in paragraph 16, the Colina Entities are the winning bidder on Asset 8, and its bid in the amount of $445,000.00 is due on or before May 7, 2007 at 5 p.m. Should Geis not fund as set forth in paragraph 4, the Colina Entities will also be the winning

bidder on aggregate Assets 1 and 5 for $250,000.00 and shall likewise close on or before May 7, 2007 at 5 p.m.

17 Pursuant to paragraph 9 of the Bid Procedures Order, if any winning bidder or alternate bidder not fund by the deadline set forth in this Order, the defaulting bidder shall forfeit to the Trustee the $50,000.00 deposit previously delivered to the Trustee.

18. A status conference on the Sale is set for Friday, May 4, 2007 at 10:30 a.m.

19. The Court shall retain exclusive jurisdiction to address any and all matters related to the sale and the provisions of this Order.

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This order was prepared and is being submitted by:
Helen G. Schwartz
Pulman, Bresnahan, Pullen & Cappuccio, LLP
2161 NW Military Highway, Suite 400
San Antonio, Texas 78213

Bid Procedures

1. Bid may be for any or all of the assets described on Exhibit 1 attached hereto (the "Assets").

2. Any proposed buyer desiring to bid on any one or more of the Assets shall submit a written bid (a "Bid") to counsel for the Chapter 7 Trustee (the "Trustee") setting out the full name and identity of the Bidder or Bidders and the proposed purchase price and any other consideration and identification of the Asset(s) to be purchased. Any such Bid shall be submitted so as to be received no later than Tuesday, April 24, 2007, at 4:00 p.m. Central Time (the "Bid Deadline"). A Bid may be submitted electronically to the Trustee, via facsimile to (210) 892-1610 or hand delivered to Pulman Bresnahan Pullen & Cappuccio LLP, 2161 N.W. Military Highway, Suite 400, San Antonio, Texas 78213, Attention: Helen Schwartz.

3. In order to be a Qualified Bid, each proposed buyer must deliver a certified or cashier's check or other cash equivalent in the amount of fifty thousand dollars ($50,000) (the "Deposit"), made payable to "Helen G. Schwartz, Trustee for the estate of Villaje Del Rio, Ltd." Deposits are due on or before the Bid Deadline. The Trustee shall hold in escrow (without interest) the Deposit of the first highest and best Bidder and

the Deposit of the second highest and best Bidder until the earlier to occur of (I) the Closing or (ii) five days after the Sale Hearing. In the event the Trustee is unable to consummate a sale because of a breach or failure on the part of the Successful Bidder(s), the Trustee, on behalf of the estate, shall retain the Deposit as liquidated damages, and the next highest or otherwise best Qualified Bidder, as disclosed at the Sale Hearing, shall be deemed the Successful Bidder and shall consummate the sale without further order of the Court.

4. The auction of the Asset(s) (the "Auction") shall be conducted at the hearing on the *Motion to Sell Property Free and Clear of All Liens and Interests (Claims Against Colina Del Rio, L.P. and Andres Construction Services, Inc.)* (the "Motion") which is scheduled for May 1, 2007, at 9:30 a.m. Central Daylight Savings Time (the "Hearing"). Prior to 4:00 p.m. Thursday, April 26, 2007, the Trustee shall notify all Bidders which Bid the Trustee asserts is the highest and best Bid for the Asset(s) (the "Lead Bid") and provide all Bidders with a copy of the Lead Bid.

5. The Auction shall be conducted on open outcry in the Courtroom of the Honorable Ronald B. King, United States Bankruptcy Court Judge, Courtroom Number Three, Fifth Floor, United States Bankruptcy Court, 615 E. Houston Street, San Antonio, Texas, 78205. If any party wishes to make an overbid in excess of the Lead Bid, they must have a representative (which

may be counsel) present at the Hearing. If a Bidder makes such a Bid, the Auction shall continue until there is no further Bid (or combination of Bids) topping the value of the previous Bid (or combination of Bids) by at least $5,000 in total consideration (the "Winning Bid"). The Bankruptcy Court shall conduct all aspects of the Auction, including, without limitation, how long a Bidder has to submit an overbid.

6. Nothing herein shall prohibit the inclusion of additional consideration in calculating the value of a Bid, including without limitation, waiver of claims, subordination of claims, or a loan to the Bankruptcy Estate. The Chapter 7 Trustee shall determine what Bid is the "highest and best" Bid, subject to approval of the United States Bankruptcy Judge. For example, but not by way of limitation, the Court may determine that a cash offer of $300,000 has more value than an offer of a $350,000 note due in one year; the Court may determine that a cash offer of $300,000 plus waiver of an unsecured claim for $50,000 has more value than a cash offer of $325,000, based upon the Court's estimation of the recovery for unsecured creditors; or the Court may determine that a cash offer of $300,000 plus a waiver of a security interest has more value than a cash offer of $325,000 depending on the allocation of the Bid.

7. The Auction shall continue in the same manner until there is no Bid (or combination of Bids)

which is higher and better than the previous Bid.

8. All sales shall be free and clear of liens, claims and encumbrances and other interests and any liens, claims and encumbrances attaching to the proceeds of the sale. To the extent there is a dispute as to the allocation of the purchase price of a Bid for any Asset, the Bankruptcy Court shall make a determination at the Hearing as to the amount, if any, to be allocated on an interim basis and held in reserve pending a determination of the extent or validity of such liens.

9. The closing shall occur within two (2) business days of the entry of the Order Approving the Sale of Assets (the "Closing") with time being of the essence. If the winning Bidder fails to consummate the purchase of the Assets on or before the date of the Closing, the Debtor shall proceed to close the second highest Bid, which then shall be considered the Winning Bid, within two (2) business days of the first Closing or, if no second highest Bid was approved in the Order, may offer such Assets for sale and sell such Assets pursuant to further order of the Bankruptcy Court.

10. At the time a Bid is submitted to the Trustee, all Bidders shall also submit to the Trustee sufficient financial information to establish that such Bidder has the financial ability to timely close on the Bid. Any determination made by

the Trustee of the financial ability or inability to close is a preliminary determination, subject to review by the Bankruptcy Court at the Hearing. Any Bidder or other party-in-interest may request that the Bankruptcy Court determine the financial ability of any Bidder to close. In the event of such a request, the Bidder shall submit to the Court for the Court's confidential review, the financial information submitted to the Trustee or such other additional financial information as the Bidder chooses to submit to the Court for the Court's review and determination as to whether a Bidder is a qualified Bidder. Further, as bidding progresses, the Court or the Trustee may request additional evidence of financial ability to close. A determination by the Bankruptcy Court that a Bidder is not a qualified Bidder shall disqualify that Bidder from further participation in Auction.

11. All sales shall be final and "as is," "where is" and the Debtor shall not be required to make any representations or warranties in connection with any sales.

	Asset	Notes or Comments	Minimum Allocated Value
1	All claims against Colina Del Rio, LP ("Colina").		$100,000
2	All claims sounding in tort, including without limitation, claims asserted to be fraud claims against Andres Holding Corporation f/k/a Andres Construction Services, Inc. ("Andres").		$100,000
3	All claims against Andres not sounding in tort.	Colina asserts a security interest in these Assets.	$100,000. Colina will have the right to credit bid.

Exhibit 1

	Asset	Notes or Comments	Minimum Allocated Value
4	All claims against The Hartford.	Colina asserts a security interest in these Assets.	$100,000. Colina will have the right to credit bid.
5	All claims against George Geis, George Geis d/b/a Rio City, Villaje Management LLC, Goldbrick, Inc., Rio Architects and Geis Construction sounding in tort.		$100,000

	Asset	Notes or Comments	Minimum Allocated Value
6	All claims against George Geis, George Geis d/b/a Rio City, Villaje Management LLC, Goldbrick, Inc., Rio Architects and Geis Construction not sounding in tort, save and except, Chapter 5 Claims.	Colina asserts a security interest in these Assets.	$100,000. Colina will have the right to credit bid.
7	All personal property which was acquired by or on behalf of Villaje Del Rio, Ltd. ("Debtor") in connection with the Project.	Colina asserts a security interest in these Assets	$100,000. Colina will have the right to credit bid.
8	All claims against Deutsche Bank Berkshire Mortgage Inc.		$75,000

[FILED ON JUNE 13, 2007]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VILLAJE DEL RIO, LTD.	§	
Appellant	§	
	§	
v.	§	Case No. SA-
	§	06-CV-01102-FB
COLINA DEL RIO, LP	§	
Appellee	§	

APPELLANT'S MOTION FOR ABSTENTION AND REMAND

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

George Geis, as owner of the claims of Villaje Del Rio, Ltd. asserted in this action, files this Motion for Abstention and Remand, as follows:

1. This action was originally commenced in Bexar County state district court, Cause No. 2006CI06703, on April 27, 2006.

2. On May 1, 2006, Villaje Del Rio, Ltd. ("Villaje") filed its Voluntary Petition under Chapter 11 of Title 11 of the United States Code. Thereafter, Colina del Rio, L.P., one of the Defendants, removed this action to this Court by filing a Notice of Removal

on May 9, 2006. The sole ground alleged for removal was pursuant to 11 U.S.C. §1334.

3. Following entry of summary judgment in Colina's favor, Colina was severed from this action by Order dated November 14, 2006, and James Satel was dismissed by order dated December 20, 2006. Appellant timely filed its Notice of Appeal, and this matter is now before this Court.

4. Villaje's Chapter 11 proceeding was converted to a proceeding under Chapter 7 pursuant this Court's Order dated February 15, 2007. On May 1, 2007, the Court held an auction of the remaining assets of Villaje. At that auction, Mr. Geis purchased the claims asserted by Villaje in this lawsuit, and according to the Order approving the sale on May 2, 2007, Mr. Geis is now the owner of these claims. See Order, Ex. "A" hereto. The Estate has no remaining interest in those claims, or in this proceeding.

Abstention is Mandatory

5. 28 U.S.C. §1334(c)(2) provides:

> (c)...(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the

district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

6. Accordingly, courts *must* abstain from hearing a state law claim if the following requirements are met: (1) a motion has been timely filed requesting abstention; (2) the cause of action is essentially one that is premised on state law; (3) the claim is a non-core proceeding, *i.e.*, it is "related to" a case under title 11 but does not arise under or in a case under title 11; (4) the proceeding could not otherwise have been commenced in federal court absent federal jurisdiction under §1334(b); (5) an action has been commenced in state court; and (6) the action could be adjudicated timely in state court. *See Schuster v. Mims (In re Rupp & Bowman Co.)*, 109 F.3d 237, 239 (5th Cir. 1997); *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1206 (5th Cir. 1996).

7. Under these standards, abstention is mandatory in this case. First, Geis timely filed this motion less than 45 days from the date of the Order approving the auction sale to Mr. Geis. There was been little activity in the appeal in that time period.

8. Second, the causes of action in this proceeding are premised upon Texas state law. Specifically, in this proceeding, Villaje has sued for damages under Texas state law theories for tortious interference and economic duress. These matters are governed by Texas state law and not by any federal

law. The issues between VIllaje and Colina, i.e. whether Villaje is entitled to set-off or recoupment of its damages against the indebtedness asserted by Colina are governed exclusively by Texas state law.

9. Third, this is clearly a non-core proceeding. In the 5th Circuit, the test of whether a claim is core or non-core is quite clear: "a proceeding is core under §157 if it invokes substantive rights provided by Title 11 or if it is a proceeding that, by its nature, could only arise in the context of a bankruptcy case". *Wood v. Wood (Matter of Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). Because Mr. Geis has purchased the claims in this proceeding, and the causes of action are not of the type that could only arise in a bankruptcy proceeding, this matter is non-core.

10. Fourth, this proceeding could not otherwise have been commenced in federal court absent bankruptcy jurisdiction. When filed in state court, and when removed to this court, there was no diversity of citizenship between the parties, with a Texas party as plaintiff and two of the three defendants as Texas parties. Moreover, *as between the parties to this appeal*, there is clearly no diversity because both Appellant and Appellee are Texas limited partnerships. Additionally, there was (and is) no basis for federal question jurisdiction. Accordingly, this proceeding could not have been commenced in federal court absent the bankruptcy court jurisdiction under §1334(b). In determining whether this element is met (*i.e.* whether the case could have been commenced in federal court absent bankruptcy jurisdiction), the specific working of the statute requires that the Court

look at the posture as of the time of removal. *See J.T. Thorpe Co. v. American* Motorists, 2003 WL 23323005 at *4 (S.D. Tex. 2003); *WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F.Supp.2d 596, 606 (S.D. Tex. 1999). As noted above, as of the time of removal, there was no diversity.

11. Finally, this action has clearly already been commenced in state court, and Plaintiff believes it can be timely adjudicated in state court. The courts in Bexar County, Texas are well suited to handle a proceeding involving questions of Texas state law, and the parties can obtain appropriate settings with the state courts.

Alternatively, Discretionary Abstention is Appropriate

12. Should the court decide that abstention is not mandatory, the Court should exercise its discretion to abstain from hearing this matter and remand the action to state court. Discretionary abstention under 28 U.S.C. §1334(c)(1) is typically applied by bankruptcy courts by reference to twelve different factors to determine whether discretionary abstention is appropriate. *See, e.g., Republic Reader Service, Inc. v. Magazine Service Bureau, Inc. (In re Republic Reader Service, Inc.)*, 81 B.R. 422 (Bankr. S.D. Tex. 1987). These factors include, among other things, whether the proceeding is core or non-core, what state law is applicable, the effect on the administration of the bankruptcy estate, the possibility of forum shopping, the burden on the bankruptcy court's docket, the right to jury trial and other matters. Clearly, this

is a non-core proceeding, which has no effect on the bankruptcy estate (as noted, the Esate no longer holds any interest in the claims aserted). The issues and claims are claims under Texas state law. Moreover, there is no likelihood that this is an exercise in forum shopping by the Plaintiff, as this action was originally commenced in state court, which can timely adjudicate these matters and can clearly hold a jury trial as requested by the Plaintiff. Finally, there is no danger or prejudice to Colina, which was originally sued in Bexar County state court to begin with. As such, discretionary abstention is appropriate.

13. In short, there is no basis for this Court to continue to exercise jurisdiction over this proceeding, nor for the federal district court to do so. As such, abstention is appropriate.

WHEREFORE, based on the foregoing, George Geis requests that the Court abstain from hearing this matter and remand it to state court, and that he have such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

HOHMANN, TAUBE & SUMMERS, L.L.P.

By: /s/Mark C. Taylor
Eric J. Taube
State Bar No. 19679350
Mark C. Taylor
State Bar No. 19713225
100 Congress Avenue, 18th Floor
Austin, Texas 78701
Telephone: 512/472-5997
Telecopier: 512/472-5248

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served upon the persons listed below by first class mail on this 13th day of June, 2007.

Bonnie Hochman Rothell
Krooth & Altman, LLP
1850 M Street, N.W.,
Suite 400
Washington, D.C. 20036

United States Trustee
615 E. Houston, Suite
533
P.O. Box 1539
San Antonio, Texas
78295-1539

/s/ Mark C. Taylor
Mark C. Taylor

[FILED ON APRIL 27, 2006]

CAUSE NO. 2006CI06703

VILLAJE DEL RIO, LTD.	§	IN THE DISTRICT COURT
	§	
VS.	§	57TH JUDICIAL DISTRICT
	§	
COLINA DEL RIO, LTD., JAMES E. SATEL, TRUSTEE, DEUTSCHE BANK BERKSHIRE MORTGAGE, INC.	§	BEXAR COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER

This suit is brought by Villaje Del Rio, Ltd. against Colina Del Rio, LP (hereinafter "Colina"), James E. Satel, substitute trustee (hereafter "Trustee"), and Deutsche Bank Berkshire Mortgage, Inc. (hereafter "Deutsche Bank"), on the following grounds:

1. Discovery will be conducted at Level 2.

2. Plaintiff is a Texas limited partnership maintaining its offices and principal place of business in San Antonio, Texas.

3. Defendant Colina Del Rio, L.P., is the current holder of the Note and Mortgage of the property that is the subject of this dispute. Colina's Registered Agent, Phillip A. Kolvson may be served with process by Certified Mail/Return Receipt Requested at 13750 San Pedro, Suite 600, San Antonio, Texas 78232.

4. Defendant, James E. Satel is the substitute trustee who has been employed to conduct a foreclosure sale of the property that is the subject of this dispute. He is sued only in his capacity as Trustee. He may be served with process at 800 One Alamo Center, 106 S. St. Mary's Street, San Antonio, Texas 78205.

5. Defendant Deutsche Bank Berkshire Mortgage, Inc., is a Delaware corporation doing business in Texas, and was the original owner and holder of the note and mortgage to the property that is the subject of this dispute. Deutsche Bank's Registered Agent, CT Corporation System may be served with process by Certified Mail/Return Receipt Requested at 350 N. St. Paul Street, Dallas, Texas 75201.

6. The claim and causes of action herein asserted arises from a construction project known as Villaje Del Rio in San Antonio. All or a substantial part of the events giving rise to Plaintiff's cause of action occurred in San Antonio, Bexar County, Texas. Jurisdiction and venue are in the District Court of Bexar County, Texas.

7. Villaje Del Rio is a $26,747,700.00 project that was underwritten for Project Mortgage Insurance by the United States Department of Housing and Urban Development ("HUD") and identified as FHA No. 115-32002-PM. The project was to be built for the owner, Villaje Del Rio, Ltd. ("Villaje") by Andres Holding Corporation f/k/a Andres Construction Services, Inc. ("Andres"). The original lender was Berkshire Mortgage Finance which was acquired by Deutsche Bank. The lender then became Deutsche Bank Berkshire Mortgage Inc.

8. During the construction of the project, both Deutsche Bank and HUD oversaw and monitored the progress of the construction. On March 19, 2004, Villaje, the supervising architect and Villaje's counsel met with Deutsche Bank and HUD officials to advise them that Andres had put Villaje on notice that it was short $1,320,097.00 on its fixed cost contract and requested the owner to agree to a supplemental contract. Villaje also pointed out that Andres had not provided a schedule for completion of the project, did not have capable supervision on the job and was turning in monthly draws that were not proportionate to construction progress. Villaje informed Deutsche Bank that Andres was going to run out of money in the concrete section within months and would try to force Villaje into default and shut the job down. By March 19, 2004 Villaje had advised Deutsche Bank and HUD that the mortgage was out of balance because the construction progress was not keeping up with the draw requests, and that the change orders requested should not be entered into. Thereafter, Deutsche Bank, together with HUD, began interfering with

Villaje's contractual rights with Andres, and forced Villaje to sign draw requests and change orders that it opposed. For example, in May of 2004 Deutsche Bank and HUD, acting together, instructed the HUD project inspector not to sign any more pay requisitions until the change orders being requested by the contractor were finalized. From that day forward, Deutsche Bank, acting with HUD, managed all future pay requests. The change orders to which the owner objected contained wholly unacceptable increases in the contract amount. The owner objected to those unauthorized changes but Deutsche Bank forced acceptance of them under threat of putting the project in default, accelerating the note, seeking payment from Federal Funds, and turning the note and mortgage over to HUD for foreclosure.

10. On June 10, 2004, Deutsche Bank, acting together with HUD, informed Villaje's representative, George Geis, in no uncertain terms that if the owner did not immediately approve the contractor's change orders and pay requisition, the job would be shut down. Faced with that ultimatum, Villaje was forced to sign a pay application containing a $1,347,257.00 overpayment. Each and every subsequent draw request was administered in the same way.

11. The contractor was finally terminated for cause by Villaje on October 28, 2004. At that point, Andres had been overpaid $2,566,917.00. This overpayment was caused by the coercion of Deutsche Bank, its wrongfully usurping Villaje's right to direct the construction of the project and manage the progress with the contract balance. Since the time the

contractor was terminated as a result of the overpayments, construction on the project has come to a halt. Although Villaje made diligent efforts to avoid default on the note and complete the project, the task became impossible to perform as a result of the overpayment forced on the owner by Deutsche Bank, the deficient contract balance to complete the project, the acceleration of the note by Deutsche Bank, the reacquisition of the mortgage loan by HUD, HUD's sale of the loan to Colina, and the pending foreclosure of the property scheduled for May 2, 2006. Deutsche Bank's conduct gives rise to a cause of action for tortious interference with its contract. But for Deutsche Bank's interference and forcing the overpayment with threat of default, Villaje would not have been forced to fire Andres, or in the event Andres had to be fired, there would have been sufficient funds to retain a completing contractor and avoid default. Villaje seeks actual and exemplary damages that greatly exceed the jurisdictional requisites of this Court.

12. Colina purchased the note and mortgage from HUD with full knowledge that the note was subject to all the claims, defenses and offsets that Villaje has against the original holder, Deutsche Bank. Colina is not a holder in due course. Colina is attempting to foreclose on the subject property and a copy of the Colina letter notifying Villaje of the pending foreclosure sale is attached as Exhibit A. Villaje requests that Colina, who has stepped in the shoes of Deutsche Bank, be enjoined from foreclosing on the property on the following grounds:

a) Villaje's claims against Deutsche Bank for actual and exemplary damages exceed the amount owed on the note; to the extent the damages do not extinguish any debt owed on the note, the balance owed on the note cannot be determined until such claims have been adjudicated or otherwise resolved;

b) Deutsche Bank's tortious interference with the Andres contract caused the default, and Deutsche Bank's successor, Colina, should be enjoined from foreclosing on the property;

c) The property is unique and irreparable harm would be caused Villaje in the event the foreclosure goes forward, for which Villaje would have no adequate remedy at law.

By preventing the sale of the loan, the court will make it possible for the matter to be duly and properly litigated and for the controversy between Villaje, Deutsche Bank and its successor to the note, Colina, to be resolved by appropriate judicial process.

13. A temporary restraining order should be issued without notice to prevent the foreclosure. Upon hearing, the temporary restraining order should be made into a temporary injunction, and upon trial, a permanent injunction should be issued enjoining Colina from foreclosing on the note until such time as

Plaintiff's claims are finally resolved by a court of competent jurisdiction.

WHEREFORE, Plaintiff prays that a temporary restraining order issue without notice, restraining and enjoining Colina, the Trustee, and their agents and employees and those acting in concert with them from foreclosing on the Note on the Villaje Del Rio project. Plaintiff prays for a hearing, and upon hearing, that the temporary restraining order be made into a temporary injunction, and upon trial a permanent injunction, enjoining and restraining the foreclosure of the Note until such time as Plaintiff's claims against Colina and Deutsche Bank can be resolved by a court of competent jurisdiction. Plaintiff prays for costs and general relief.

Respectfully submitted,

BARRY SNELL
State Bar No. 18789000
BAYNE, SNELL & KRAUSE
8626 Tesoro Drive, Suite 500
San Antonio, Texas 78217
Telephone: (210) 824-3278
Facsimile: (210) 824-3937

THOMAS G. KEMMY
LAW OFFICES OF THOMAS G. KEMMY
322 W. Woodlawn Avenue
San Antonio, Texas 78212
Telephone: (210) 735-2233
Facsimile: (210) 736-9025

By: // s //
THOMAS G. KEMMY
State Bar No. 1125460

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Plaintiff's Original Petition and Application for Temporary Restraining Order* was this the 27th day of APRIL, 2006, forwarded to:

JAMES E. SATEL
BRACEWELL & GIULIANAI, L.L.P.
800 One Alamo Center
106 S. St. Mary's Street
San Antonio, Texas 78205-3605
VIA CMRRR#7003 1010 0002 0689 1969

// s //
THOMAS G. KEMMY

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared George A. Geis, who, after being by me first duly sworn upon his oath, stated as follows:

I, George Geis, am the manager of Villaje Management, L.L.C., a Texas Limited Liability Company which is sole general partner of Villaje Del Rio, Ltd. I am personally familiar with the facts contained in the foregoing Petition. My knowledge of the facts obtained therein was acquired in the course of my managing the Villaje Del Rio, Ltd. during the construction of the Villaje Del Rio project. Each of the facts contained in the foregoing Petition are true and correct.

Signed on this the ____ day of _____, 2006.

// s //
GEORGE A. GEIS

SWORN TO AND SUBSCRIBED before me on this the ____ day of _____, 2006.

NOTARY PUBLIC,
STATE OF TEXAS